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IN THE

# Supreme Court of the United States

October Term, 1977

No. 77-1424

HARVEY BARRY JACOBS, M.D.,
*Petitioner*

v.

UNITED STATES OF AMERICA

## PETITIONER'S REPLY BRIEF

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The Government's Brief In Opposition presents an inaccurate and distorted statement of the facts and evidence at trial which only serves to obscure the two basic questions in this case.

### I.

The first question is whether hearsay declarations of a co-conspirator allegedly made in furtherance of a conspiracy are admissible in a federal conspiracy trial where such declarations are "unreliable" and "crucial" to the case.

*Dutton v. Evans.* The Government does not dispute petitioner's assertion that the hearsay declarations were unreliable and crucial but instead argues that the hearsay statements were admissible because there was substantial "independent evidence" of the conspiracy. Simply stated, the Government does not address the question raised in the petition — is the Confrontation Clause of the Sixth Amendment in a federal conspiracy trial coextensive with the federal conspiracy exception to the hearsay rule? Does the Constitution require not only that there be independent evidence of the conspiracy, but also that the declarant be reliable and the statements less than crucial to the case? (400 U.S. at 83-87).

Despite the Government's assertion to the contrary, the only evidence that petitioner joined, knew of, or participated in a conspiracy to defraud is the hearsay declarations of Victor Salerno. For example, after a long description of the laboratory order sheet used by petitioner's clinic the Government makes the following statement:

> *Salerno told* the laboratory supervisor that this was done because petitioner did not want the printed teletype reports to appear on patient's charts in case there was an investigation. (G.Br.4).

When the Government refers to the matter of "sink testing" [throwing samples away and providing the doctor with spurious test results] the Government again makes the following statement:

> *Salerno told* a number of laboratory employees that petitioner was aware of the practice (Tr. 286-287, 313, 373). (G.Br.4)

Suggesting that a medical doctor would condone or permit "sink testing" is of course devastating evidence. Salerno, a fugitive, would make such statements only to shift



responsibility from his shoulders to the petitioners and therefore the declarant is completely unreliable.

The Government makes a presentation of facts in support of the argument that sufficient independent evidence of the conspiracy existed to justify admissibility of the hearsay declarations. If the Sixth Amendment is no broader than the hearsay rule then the existence or non-existence of independent evidence in any given case is not a matter which should be reviewed by this Court except in the most unusual circumstances. However, in *Dutton* this Court suggested that the Confrontation Clause of the Sixth Amendment, even in a federal conspiracy trial, is broader than the hearsay rule and requires not only independent evidence, but also that the declarant be reliable, and that the statements not be devastating to the defendant. This case presents the Court with the opportunity to clarify once and for all the Constitutional limitations, if any, on the admissibility of hearsay declarations in a federal conspiracy trial.

## II.

Petitioner was charged with ten counts of mail fraud, but the Court required the Government to select five for trial. The case was submitted to the jury with instructions that, if it decided that it could return a verdict of guilty with respect to any one or more of the five counts, it should return a single verdict without indicating which of the five mailings formed the basis thereof. In other words, the jury did not return a guilty verdict as to any specific count in the indictment. Two of the four substantive counts in the indictment were concerned with billing for tests not performed ("sink testing") and the other two substantive counts concerned billing as individual test procedures for tests performed on a machine. The pertinent HEW regulation, applicable to the "machine" counts reads as follows:

> Physicians or other persons who perform uniform series of tests and examinations or common combinations of procedures may, of course, itemize the individual components of these services on their bills if they wish *and* make separate charges for them. When this occurs a separate reasonable charge determination for each item is necessary (see J.A. V A23-A27) (emphasis added).

The Government ignores the conjunctive language of the regulation "and make separate charges for them" and asserts the regulation concerns only the format of a bill submitted to the Department, not whether payments should be made on an individual basis for tests performed on a machine. The Court of Appeals described the regulation as "confusing" without construing it. Petitioner respectfully submits the Goverment errs in its suggested construction of the regulation and the Court of Appeals erred when describing the regulation as "confusing" without further comment. Petitioner asserts the regulation is plain on its face, authorizes the itemization by individual component of tests performed on a machine and authorizes payment of separate charges for the individual components.

Petitioner's submission of bills to HEW in this manner is no different than a taxpayer who takes accelerated depreciation on his tax return for real estate that is not only *not* depreciating but increasing in value. The taxpayer takes the depreciation because the Government has authorized him to do so and such conduct could not form the basis for a tax fraud charge. Here petitioner followed the HEW regulation when submitting bills for machine tests and his billing procedure is on no different footing than the taxpayer who benefits from regulations which are inconsistent with economic realities.

As evidence of "fraud" the Government refers to a meeting at the home of Dr. DeMeo where petitioner and an



alleged co-conspirator, Victor Salerno discussed using a machine to do laboratory tests. When petitioner learned that Medicare and Medicaid paid the same rate for performing tests on a machine as was paid for performing the tests manually he expressed the sentiment that the policy was a "rip-off". There was no evidence at trial that the term "rip-off" was ever used by petitioner as an expression of his plans or intentions as the Government would have this Court believe. (Compare G.Br.3 with Tr.78, 115-116, 379-380, 596).[1]

Whether or not petitioner believed the HEW policy to be a "rip-off" is totally irrelevant to the question raised in the petition. It is axiomatic that one who does a perfectly lawful act can not be convicted of an offense under the laws of the United States simply because he believes the law *should* be different than it is. Therefore, whatever meaning or connotation is ascribed to the term "rip-off" the fact is the billing procedure used by petitioner was in compliance with HEW regulations and can not as a matter of law form the basis for a charge of mail fraud.

The Government has simply not addressed its Memorandum to those certiorari-related questions.

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[1]The Government similarly distorts the evidence by suggesting that petitioner attempted to conceal his interests in the laboratory from State Medicare investigators. It is clear from the transcript that petitioner, when interviewed by a Medicare investigator, asked the investigator how he had learned that petitioner was a stockholder in the laboratory. The investigator explained that such information was available from the State Corporation Commission and petitioner simply responded to the answer by expressing surprise that such information was a matter of public record. (Compare G. Br.4 with Tr. 419-422).

## CONCLUSION

For these additional reasons, the Petition should be granted.

Respectfully submitted,

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